In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 838

DANIEL SORANNO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 401 F. 2d 534.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1968. A petition for rehearing was denied on October 15, 1968. Mr. Justice Douglas extended the time to file a petition for a writ of cer-

tiorari to December 14, 1968 and the petition was filed on December 13, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, who failed to obey an order to report for induction, may defend against a criminal prosecution for failure to submit to induction on the ground that he was wrongfully classified I-A in violation of the Selective Service Act.

STATEMENT

After a jury-waived trial in the United States District Court for the Eastern District of California, petitioner was convicted of willfully and knowingly failing to report for and submit to induction into the Armed Forces, in violation of 50 U.S.C. App. 462. On October 30, 1967, he was sentenced to imprisonment for a period of three years.

The facts of the case are not in dispute. Petitioner, who was born on November 15, 1940, first registered with his local Selective Service Board on May 19, 1960 (S.S. File 2, 4).[1] On August 23, 1961, petitioner was classified I-A (S.S. File 12). He did not appeal that classification. On October 18, 1963, following a physical examination, petitioner was ordered to report for induction on November 12, 1963 (S.S. File 12, 119). On October 24, 1963, an order postponing petitioner's induction was entered and on October 30,

[1] We are lodging a copy of petitioner's Selective Service File with the Clerk of the Court.

1963 petitioner was classified I-S (S.S. File 12). On September 20, 1964, petitioner wrote that he had become a member of Jehovah's Witnesses and requested a form for claiming conscientious objection which was mailed to him. Petitioner completed it and returned it to his local board. On October 28, 1964, he was classified II-S (S.S. File 12, 40).

On September 15, 1965, petitioner was reclassified I-A but on October 16, 1965, he was reclassified I-O, the classification for conscientious objectors (S.S. File 12). On October 26, 1965, petitioner asked the board to consider his request for a student deferment and notified it that he desired to appeal his I-O classification (S.S. File 63). On November 10, 1965, the local board reclassified him I-A (S.S. File 12). On November 21, 1965, petitioner notified his local board that he was exercising his right to appeal that classification to the appeal board on the ground that he was entitled to either a student deferment or conscientious objector classification (S.S. File 65). In accordance with the procedure then provided by Section 6(j), 50 U.S.C. App. 456(j), of the Universal Military Training and Service Act, the appeal board referred the case to the Department of Justice for an advisory opinion with respect to petitioner's conscientious objector claim (S.S. File 68). On September 7, 1966, the Department of Justice recommended that petitioner's conscientious objector claim not be sustained on the ground that there was doubt as to the existence of the deep and sincere religious belief necessary to sustain such a claim (S.S. File 72-75). On October 12, 1966, petitioner was classified I-A by the appeal board (S.S. File 13, 101).

On October 18, 1966, petitioner was ordered to report for induction on November 3, 1966 (S.S. File 13, 103). Petitioner failed to report for induction on that date (S.S. File 13). After consulting an attorney, petitioner, on November 15, 1966, wrote to his draft board requesting that he be reordered to report for induction so that he could report and, if found physically fit for service, he could then refuse to submit for induction and thus assure his right to assert the defense of misclassification in a criminal prosecution for failing to submit to induction (S.S. File 115-116). On February 3, 1967, the local board informed petitioner that he was under a continuing duty to report for induction; and ordered him to report on February 9, 1967. (S.S. File 13, 130). Pursuant to petitioner's request his induction order was transferred to Sacramento and he was ordered to report on March 8, 1967 (S.S. File 13, 133). However, petitioner again failed to report for induction (S.S. File 13). At his trial petitioner contended that his failure to report for induction should be excused because his nose had been recently operated on and he was afraid of being struck on the nose if he reported to the induction center which had been the scene of violence by protestors, police and draftees (R. 75, 94, 95).

ARGUMENT

As both courts below concluded, petitioner is precluded from attacking his classification in this criminal prosecution for failing to report for induction because he failed to complete the administrative process.

Although, at his request, he was given a second chance to report for induction, he failed to do so. In *Falbo* v. *United States*, 320 U.S. 549, 553, this Court noted that a registrant who has exhausted his administrative appeals may still be rejected for service at the physical examination at the induction center prior to actual induction. Consequently this Court held that a registrant who failed to report to the induction center for such a physical examination had not completed the administrative process and could not assert the defense of misclassification in a prosecution for failing to report for induction. See also *Gibson* v. *United States*, 329 U.S. 338, 343-345. The rationale underlying the *Falbo* doctrine has been explained as being that "even after administrative remedies have been exhausted, a court will not examine the validity of a classification until the registrant establishes that he has been aggrieved. A registrant is aggrieved only when the selection process is at an end and there is no longer a possibility of rejection as a part of that process". *Daniels* v. *United States*, 372 F. 2d 407, 414 (C.A. 9, *en banc*). See, the government's brief in *McKart* v. *United States*, No. 403 this Term, certiorari granted October 28, 1968, pp. 25-29. Here petitioner would have been given a complete physical examination at the induction center. Army Reg. 601-270. As the court said in *United States* v. *Irons*, 369 F. 2d 557, 558 (C.A. 6):

> Even if improperly classified I-A, there remains the possibility, unfortunately all too great in these times, that he will fail the physical examination and be reclassified as 4-F. Where this

is the result, all constitutional and other problems incident to I-A classification disappear of course, *eo instanti.*

Petitioner attempts to excuse his failure to report to the induction center on the ground that he was afraid of being hit on his nose which had recently been operated on. However, as the court below concluded, this excuse for failing "to go to the brink of induction" is insufficient. Petitioner himself asked for the second chance to report and requested that the order to report be transferred to Sacramento. This case differs from *Donato* v. *United States*, 302 F. 2d 468, relied upon by petitioner, in which the court excused a failure to appeal a selective service classification because the defendant had been summoned to firefighting duty during the time specified for an appeal from the classification decision and the appeal period had expired when he returned from the firefighting mission. Here, implicit in the trial court's finding that petitioner had wilfully failed to report for induction, was a rejection of petitioner's testimony that his failure to report for induction resulted from his fear of injury.[2]

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[2] Although, under these circumstances, we do not have to reach the question of the correctness of petitioner's classification, an examination of petitioner's file discloses that there was ample basis in fact for the appeal board's denial of conscientious objector status to petitioner (S.S. File 72-81). The fact that petitioner did not claim conscientious objector status until he was found physically fit for armed service and the complaints of his coreligionists that petitioner had decreased his religious participation support this determination.

Similarly, petitioner's claim that his local board arbitrarily changed his classification from I-O to I-A when he requested

Since the validity of the exhaustion of administrative remedies doctrine is now pending before the Court in *McKart* v. *United States*, No. 403 this Term, and, *DuVernay* v. *United States*, No. 814 this Term, the Court may wish to defer action on this petition until it decides those cases.

Respectfully submitted.

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FEBRUARY 1969

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a student deferment must be rejected. The board may well have reexamined the file and concluded that it had been wrong the first time. In any event, the classification was reexamined *de novo* by the appeal board when petitioner appealed. The action of the appeal board completely supersedes the action of the local board and any defects in the local board action are cured. *Tomlimson* v. *United States*, 216 F. 2d 12, 16 (C.A. 9), certiorari denied, 348 U.S. 970; *DeRemer* v. *United States*, 340 F. 2d 712, 719 (C.A. 8).

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